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5 **UNITED STATES DISTRICT COURT**
6 **EASTERN DISTRICT OF WASHINGTON**

7 **UNITED STATES OF AMERICA,**

8 Plaintiff,

9 v.

10 **JAMES GALLAHER,**

11 Defendant.

12 NO. CR-05-224-RHW

13 **ORDER DENYING**
14 **DEFENDANT'S MOTION TO**
15 **DISMISS, *INTER ALIA***

16 Before the Court are Defendant's Motion to Dismiss Indictment for
17 Violation of Statute of Limitations (Ct. Rec. 34) and Motion to Compel Discovery
18 (Ct. Rec. 38). A hearing was held on June 1, 2006. Defendant was present and
19 represented by Stephen Hormel; Assistant United States Attorney Joseph
20 Harrington appeared on behalf of the government. At the hearing, the Court orally
21 denied Defendant's Motion to Compel Discovery and granted leave to renew the
22 motion if difficulties persist.

23 **MOTION TO DISMISS**

24 The Indictment alleges Defendant committed the crime of first degree
25 murder on or about April 14, 1991. The Indictment was returned on December 20,
26 2005, more than 14 years after the alleged crime took place. Defendant argues in
27 his Motion to Dismiss Indictment for Violation of Statute of Limitations (Ct. Rec.
28 34) that the proper statute of limitations for the alleged crime is five years and the
Indictment should be dismissed.

There are two statutes that set the limitation period for federal crimes: 18 U.S.C. §§ 3281 and 3282. Section 3281 states “[a]n indictment for any offense

1 punishable by death may be found at any time without limitation.” 18 U.S.C. §
 2 3281. Section 3282 states in pertinent part “[e]xcept as otherwise expressly
 3 provided by law, no person shall be prosecuted, tried, or punished for any offense,
 4 not capital, unless the indictment is found or the information is instituted within
 5 five years next after such offense shall have been committed.” 18 U.S.C. §
 6 3282(a). The crime of first degree murder is punishable by death or by
 7 imprisonment for life. 18 U.S.C. § 1111(b). However, in 1994 Congress passed
 8 the Federal Death Penalty Act, a portion of which gave tribal governments the
 9 discretion to determine the applicability of the death penalty to tribal members
 10 indicted for federal crimes for which jurisdiction is predicated solely on their
 11 occurrence within Indian country, as defined in 18 U.S.C. § 1151.¹ 18 U.S.C. §
 12 3598. Defendant argues that this renders the crime alleged in the Indictment “non-
 13 capital” because the legislative body of the Confederated Tribes of the Colville
 14 Reservation has not elected to have the death penalty apply within its jurisdiction.
 15 Because this alleged first degree murder is not “punishable by death,” Defendant
 16 argues the five-year statute of limitations in § 3282 should apply.

17 This question is a matter of first impression, but there are many cases that
 18 consider statutes of limitations and other procedural rules the applicability of

19 ¹ Section 3598 reads in relevant part
 20
 21 no person subject to the criminal jurisdiction of an Indian tribal
 22 government shall be subject to a capital sentence under this chapter
 23 for any offense the Federal jurisdiction for which is predicated solely
 24 on Indian country (as defined in section 1151 of this title) and which
 25 has occurred within the boundaries of Indian country, unless the
 26 governing body of the tribe has elected that this chapter have effect
 27 over land and persons subject to its criminal jurisdiction.

28 18 U.S.C. § 3598. Section 1151 defines “Indian country” as “(a) all land within
 29 the limits of any Indian reservation under the jurisdiction of the United States
 30 Government . . . , (b) all dependent Indian communities within the borders of the
 31 United States . . . , and (c) all Indian allotments, the Indian titles to which have not
 32 been extinguished. . . .” 18 U.S.C. § 1151.

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1 which are based on the capital nature of a crime. *See, e.g., United States v.*
 2 *Manning*, 56 F.3d 1196 (9th Cir. 1995); *United States v. Watson*, 496 F.2d 1125
 3 (4th Cir. 1973); *United States v. Provenzano*, 423 F. Supp. 662 (S.D.N.Y. 1976);
 4 *United States v. Helmich*, 521 F. Supp. 1246 (M.D. Fla. 1981).

5 Defendant urges the Court to use the method of analysis exemplified in
 6 *Watson* when deciding which statute of limitations applies to the alleged crime.
 7 The court in *Watson* was faced with a challenge to the lower court's denial of the
 8 defendant's request for a second lawyer pursuant to 18 U.S.C. § 3005, which
 9 requires the provision of two attorneys to defendants facing capital punishment
 10 who request additional counsel. 496 F.2d at 1125-27. The case was decided soon
 11 after the Supreme Court held the death penalty unconstitutional in *Furman v.*
 12 *Georgia*, 408 U.S. 238, 239-40 (1969). The government argued that the
 13 defendant's crime was not "capital" after *Furman*, so he was not statutorily eligible
 14 for two attorneys. *Watson*, 496 F.2d at 1126. In coming to its decision that the
 15 defendant's rights under § 3005 were violated and that the procedural rules linked
 16 to the capital nature of the offense charged remained valid after *Furman*, the
 17 *Watson* court distinguished between the effects of judicial and legislative decisions
 18 repealing statutes. *Id.* at 1127-28.

19 This distinction was elaborated upon in *Provenzano* in the context of the
 20 proper statute of limitations to apply to a kidnapping charge. 423 F. Supp. at 666.
 21 The *Provenzano* court considered the effect of Congress's decision to remove
 22 kidnapping from the classification of "capital offenses." *Id.* at 665-667. It noted
 23 that "a court has a different role when determining the ramifications of a judicial
 24 holding that a death penalty provision is unconstitutional, from that when Congress
 25 has taken some action on the matter" and found that because Congress had "clearly
 26 removed kidnapping from the classification of 'capital offenses,'" the five-year
 27 statute of limitations under § 3282 applies. *Id.* at 666-67.

28 Defendant places great emphasis on the reasoning in *Watson* and

1 *Provenzano*, arguing that, as in *Provenzano*, Congress here has acted to make
2 crimes occurring within Indian country non-capital. However, by enacting 18
3 U.S.C. § 3598, Congress did not “clearly remove” all crimes, the jurisdiction of
4 which is predicated on their occurrence in Indian country, from the classification of
5 “capital offenses.” Instead, § 3598 grants the discretion that normally resides with
6 Congress to impose a capital sentence on persons subject to the criminal
7 jurisdiction of a tribal government to the tribal governments themselves. “Capital
8 offenses” under Title 18 are still “punishable by death” under § 3598 because tribal
9 governments could elect to impose the death penalty. Congress clearly continues
10 to consider crimes such as first degree murder “capital offenses” to which an
11 unlimited period of limitations applies. *See* 18 U.S.C. §§ 1111(b), 3281.

12 The non-capital nature of the crime alleged here is clearly distinguishable
13 from that alleged in *Watson* (crime non-capital due to judicial decision) or
14 *Provenzano* (crime non-capital due to legislative action). Here, in contrast, the
15 alleged crime is non-capital because of a decision not to opt in to the death penalty
16 by the legislative body of the Confederated Tribes of the Colville Reservation.
17 Therefore, in matters such as this where federal jurisdiction is based on the crime’s
18 occurrence in Indian country, the crime is still “punishable by death;” Congress has
19 simply given tribal governments the discretion to determine whether the death
20 penalty should apply within their reservations. *See* Christopher B. Chaney, *The*
21 *Effect of the United States Supreme Court’s Decisions During the Last Quarter of*
22 *the Nineteenth Century on Tribal Criminal Jurisdiction*, 14 B.Y.U. J. Pub. L. 173,
23 181 (2000).

24 Furthermore, the unlimited statute of limitations for capital offenses in §
25 3281 is “inextricably tied to the nature of the offense.” *Manning*, 56 F.3d at 1196.
26 “Congress has made the judgment that some crimes are so serious that an offender
27 should always be punished if caught.” *Id.* Certainly, premeditated murder is
28 among the most serious of all crimes. Without a clear expression of Congressional

1 intent to remove first degree murder in Indian country from the classification of
2 capital offenses in § 3281, this Court finds the offense charged in this matter to be
3 subject to an unlimited statute of limitations.

Accordingly, IT IS HEREBY ORDERED:

5 1. Defendant's Motion to Dismiss Indictment for Violation of Statute of
6 Limitations (Ct. Rec. 34) is **DENIED**.

7 2. Defendant's Motion to Compel Discovery (Ct. Rec. 38) is **DENIED** with
8 leave to renew.

9 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
10 Order and forward copies to counsel.

DATED this 13th day of June, 2006.

s/ Robert H. Whaley

ROBERT H. WHALEY
Chief United States District Judge

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